

SOUTH AFRICA / JUDGMENT

Axton Matrix Construction (Pty) Ltd v Mbombela Local Municipality (1062/2022) [2024] ZAMPMBHC 7 (2 February 2024) [2024] ZAMPMBHC 7

COURT
Mbombela High Court, Mpumalanga

BEFORE
Mashile

CASE / FILE NUMBER
1062/2022

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
(MPUMALANGA DIVISION,
MBOMBELA)
CASE NO: 1062/2022
(1)
REPORTABLE:NO
(2)
OF INTEREST TO OTHER JUDGES:YES
(3)
REVISED: YES
DATE: 02/02/2024
SIGNATURE

In the matter between: AXTON
MATRIX CONSTRUCTION (PTY) LTD
Plaintiff / Applicant
and
MBOMBELA
LOCAL MUNICIPALITY
Defendant / Respondent
This judgment was handed
down electronically by circulation to the parties and/or parties'
representatives by email. The date
and time for hand-down is deemed
to be 02 February 2024 at 10:00.

JUDGMENT

MASHILE J:

[1] Central to this matter is whether or not the interim and final payment certificates No: 24 and 26 in the amounts of R5 792 084.90 and R2 291 298.06 respectively constitute liquid documents capable of sustaining a claim founded on provisional sentence summons. The amount claimed by the Plaintiff ("Axton") is R5 256 715.79, which is evidently, lower than the two amounts appearing on the certificates added together. The reason for the discrepancy is that the total of the two has been reduced by an amount of R2 291 296.06, which, it is common cause, the Defendant ("the Municipality") has already paid").

[2] The Municipality is opposing the claim and has raised three preliminary points premised on the following grounds:

2.1 The summons is defective;

2.2 The dispute should have been referred for arbitration. As such, the Court has no jurisdiction to entertain the matter; and

2.3 The matter was irregularly enrolled.

On the merits, the Municipality is challenging the authority of the person who signed the certificates.

FACTUAL MATRIX

[3] Prior to considering the three preliminary points, it will be wise to begin with a terse description of the facts, which are largely common cause. Doing so will give proper perspective and context in which they are raised. In June 2015 and on an unspecified date, the Municipality appointed Axton to provide various construction services in respect of the upgrade of Friedenheim Road and N4, as contemplated in Clause 3 of the agreement.

- [4] Following the appointment, the Municipality and Axton entered into a contract comprising the agreement, contract data and General Conditions of Contract of Construction Works, 2nd Edition, 2010, published by the South African Institute of Civil Engineering (“the agreement”). Axton, which was the contractor, undertook to perform its duties in line with the provisions of the agreement. Insofar as payment was concerned, the Engineer signed payment certificates in the amounts he considered due and payable, as contemplated in Clause 3 of the agreement.
- [5] After the delivery of the payment certificates, the Municipality would, in the absence of dissatisfaction, be obliged to make payment of the amount so certified to Axton subject to the latter issuing an invoice to it. Should the Municipality fail to make payment timeously, it would become liable to make payment of default interest at the prime overdraft rate. Where the Municipality was dissatisfied with the certification, it would submit a notice of dissatisfaction within 28 days failing which it would be precluded from pursuing its complaint. Once this occurs, the dispute resolution mechanisms in

Clauses 10.3 to 10.7.14 would apply.

- [6] Clause 10.10.1 prescribes the following:

“Nothing herein contained shall deprive the Contractor of the right to institute immediate court proceedings in respect of failure by the Employer to pay the amount of a payment certificate on its due date, or to pay any amount of retention money on its due date for payment.”

- [7] Mr Vellie Mapaila (“Mapaila”), the project manager of the Municipality, represented it during the currency of the agreement. His authority to do so was confirmed by the Municipal Manager, Mr Seanego (“Seanego”), Messrs AECOM, the Engineer appointed by the Municipality and Mr Oosthuizen (“Oosthuizen”),

previously of AECOM, appointed by the Municipality to close out the project. Axton alleges that the need of the Municipality to appoint Oosthuizen and Mapaila came about as a result of the Municipality failing to effect payment to AECOM. For that reason, the Municipality appointed Oosthuizen to finalise the approval of the project and all that flowed therefrom.

- [8] It is common cause that the payment certificates that concern this matter are firstly, Interim Payment Certificate No: 24 of 31 October

2019. In terms of that certificate, Mapaila certified the entitlement of Axton to payment of the amount of R5 792 084.90. Following that certificate, Axton invoiced the Municipality and the Municipality made a payment requisition in respect of the certified amount. The Municipality then proceeded to make payment of the amount of R2 826 667.18. Secondly, the Final Payment Certificate No: 26, of 14 December 2022 in terms of which Oosthuizen certified the entitlement of Axton to payment of the sum of R2 291 298.06. In consequence of the certification, Axton invoiced the Municipality.

ISSUES

- [9] The main issue that I have distilled from the above facts is whether or not the payment certificates on which the provisional sentence claim is founded is liquid as contemplated in Uniform Rule of Court
8. Prior to determining the liquidity of the documents upon which the provisional sentence claim is premised, there are three preliminary points that the Municipality has raised. Those oughts to be considered before the merits of the case.

LEGAL FRAMEWORK

- [10] Rule 8 deals with provisional sentence proceedings and it stipulates:

“(1) Where by law any person may be summoned to answer a claim made for provisional sentence, proceedings shall be instituted by way of a summons as near as may be in the accordance with Form 3 of the First Schedule, calling upon such person to pay the amount claimed or, failing such payment, to appear personally or by counsel or by an attorney who, under section 4 (2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), has the right of appearance in the Supreme Court upon a day named in such summons, not being less than 10 days after the service upon him or her of such summons, to admit or deny his or her liability.

- (2) Such summons shall be issued by the registrar and the provisions of sub-rules (3) and (4) of rule 17 shall mutatis mutandis apply.
- (3) Copies of all documents upon which the claim is founded shall be annexed to the summons and served with it.”

- [11] It is trite that for provisional sentence claim to be successful, it must be predicated on a liquid document. An agreement will be liquid for purposes of obtaining provisional sentence if, on construction, it demonstrates an unconditional undertaking to pay. The construction of the agreement must not depend on extrinsic

evidence to determine the conditionality of the terms. *Rich and others v Lagerwey*[1], which was following on the footsteps of *Inglestone v Pereira*[2], where Ramsbottom J stated the following:

“I think that where a document properly construed, shows an unconditional undertaking to pay money it evidences an existing debt,

is liquid, and will found an action for provisional sentence even though the causa debiti should show that the consideration for the undertaking is a promise by the other party which has yet to be performed; non-performance by the other party

would be a matter for defence, but would not affect the liquidity of the document.”

- [12] Similarly, in the case of *Fraser & Chalmers South Africa (Pty) Ltd v Tuckers Land Development Corporation*[3] provisional sentence was refused almost under circumstances and facts that are to a large extent 'on all fours' with the current. The Court held as follows:

"If this engineer's certificate is regarded by itself, as I have c said, I find nothing in it to suggest that the amount certified as payable is in fact payable by the defendant. That being so, the mere allegation in the summons that the person who signed the document did so as agent for the defendant cannot take the matter any further. The document ex facie its provisions does not reflect an acknowledgment of indebtedness d on the part of the defendant and accordingly it does not qualify as a liquid document sufficient to support an action for provisional sentence. That being so, the allegations now sought to be introduced into the summons would not confer any right on the plaintiff to claim provisional sentence and, accordingly, in my opinion, the application for amendment should be refused."

- [13] To the extent that a document ought to be construed in a manner that ascribes meaning to the words used in it. One must endeavour to give context when reading the provisions concerned as a whole and the circumstances attendant upon its coming into existence. In this regard, it could be instructive to refer to the case of *Endumeni Municipality* case supra where the following was stated at para 18:

"Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

- [14] The question that needs to be asked is, are the payment certificates in themselves sufficient as acknowledgment of debt by the Municipality without placing any reliance on extrinsic evidence? If the answer is in the negative, the documents are not liquid and provisional sentence should be refused. A perusal of the payment certificates reveal that they are a certification of amounts due for certain work done but they are not an indication that the amounts stated therein are due, owing and payable by the Municipality to Axton. The conclusion that the amount is due and payable to Axton can only be reached by reference to, as the Municipality contends, the contract, letters exchanged between the parties, minutes of meetings and guarantees.

- [15] The language used in the payment certificates is plain. It is apparent from the certificates that Axton has complied with the terms of the contract insofar as it has executed the work. The fact of the execution of such work has been certified by Mapaila and Oosthuizen. However, on production of the certificates, it cannot be concluded, without reference to the instruments mentioned in the preceding paragraph, that the Municipality has acknowledge its indebtedness to Axton.
- [16] To the extent that Axton may argue that the Municipality has acknowledged its indebtedness by making part payment based on one of the certificates, I need to state that the act of payment by the Municipality does not redefine what is legally regarded as liquid – a document ought to exhibit an unconditional undertaking to pay and its enforcement must not be dependent on extrinsic evidence. See, the Fraser case *supra*.
- [17] The payments certificates were intended as verification that Axton has complied with the terms of the contract. They would allow Axton to claim what is due based on the contract. It was never meant to be an acknowledgment of debt by the Municipality. I must emphasise that Axton remains at liberty to pursue payment of the amount owed by action and not provisional sentence summons.
- [18] The certification by the project manager and engineer occurs against the background of a building industry where production of inferior work is not uncommon. The idea of certification therefore becomes some guarantee that the work done is of good quality on which the employer, the Municipality in this context, can rely before payment. Again, this has nothing to do with the liquidity of the certificates.
- [19] The three cases that I have mentioned above dealing with liquidity of documents state that the document on its own, without reference to any other document, must be sufficient to constitute an acknowledgment of debt. The payment certificates do not qualify to be regarded as an unequivocal undertaking to pay money due by the Municipality to Axton. Thus, the issue of authority becomes immaterial if Axton fails to persuade this Court that the document is liquid. In the circumstances, I do not see a need to discuss the other points raised by the Municipality because Axton has failed to convince this Court at the very basic level of the liquidity of the document.
- [20] In the result, the claim fails and I make the following order:
1. Provisional sentence is refused with costs;
 2. The Defendant is directed to serve and file its plea within 20 days of date of this order.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

APPEARANCES:

Counsel for the Plaintiff: Adv DS Hodge Instructed by: Orelowitz Inc C/O Du Toit, Smuts & Partners
Counsel for the Defendant: Adv TS Ngwenya Instructed by: Thobela Thobela Attorneys
Date of Judgment: 02 February 2024

[1] 1974

(4) SA 748 (A)

[2] 1939 W.L.D. 55

[3] 1977

(2) SA 465 (W)

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